STATE OF MICHIGAN

COURT OF APPEALS

CHERYL BYNUM, a/k/a SHERYL BYNUM,

Plaintiff-Appellee,

v

THE ESAB GROUP, INC.,

Defendant-Appellant,

and

CAMCO INC., a/k/a COMMERCIAL CAM DIVISION, GENERAL ELECTRIC CO., ASEA BROWN BOVERI INC., a/k/a ASEA INC., AND MICHIGAN ARC PRODUCTS CORP.

Defendants.

UNPUBLISHED
March 23, 2001

No. 218309
Kent Circuit Court
LC No. 91-071284-NP

Before: Doctoroff, P.J., and Holbrook, Jr., and Smolenski, JJ.

PER CURIAM.

Defendant-appellant (hereinafter ESAB), appeals by leave granted from the March 3, 1999 order of the lower court granting plaintiff's motion for new trial based on juror misconduct. We affirm.

Plaintiff was severely injured when the welding robot machine on which she was performing routine maintenance unexpectedly turned on. Plaintiff's pelvis was crushed when one of the robot's mechanical arms grabbed plaintiff about her midsection. The case first went to trial in January 1993, resulting in a damage award to plaintiff in the amount of $50,000. Plaintiff was found to have been fifty percent comparatively negligent, thereby reducing her award to $25,000. Plaintiff then moved for a partial new trial on the issue of comparative negligence and damages, or alternatively on the issue of damages alone. In the event the trial court concluded that a partial new trial was inappropriate, plaintiff asked for a new trial on all issues. The trial court ordered a judgment notwithstanding the verdict on the issue of comparative negligence.

Further, citing MCR 2.611(E)(1),[1] the trial court granted additur to plaintiff in the amount of $850,000. When defendant ESAB rejected additur, the case was set for new trial on the issue of damages alone.

The second trial resulted in a jury verdict for plaintiff in the amount of $2,211,549. Defendant then appealed to this Court. In an unpublished opinion, this Court reversed the grant of JNOV. *Bynum v The ESAB Group Inc.*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 1996 (Docket No. 173473), p 2 (hereinafter *Bynum I*). Additionally, while agreeing that the damage award from the first trial was against the great weight of the evidence, this Court held that "under the circumstances of this case a new trial as to all issues is in the interest of justice." *Id.* at 3.[2] The case was remanded for a new trial.

The third trial resulted in a jury vote of 6 to 2 in favor of ESAB. Immediately following trial, plaintiff's counsel was contacted by one of the jurors, Sandra Tuinstra, regarding what she perceived as inappropriate bias on the part of some of the jurors. Plaintiff's subsequent motion for JNOV or in the alternative a new trial was based, in part, on these allegations. After an evidentiary hearing, the trial court concluded that a new trial was warranted because of jury misconduct. MCR 2.611(1)(b). Specifically, the court found "that some members of the jury's majority harbored a racial animus against plaintiff and her attorney, both of whom are African-American." The court was particularly impressed by the testimony of Tuinstra.

ESAB's sole argument on appeal is that the trial court abused its discretion when granting plaintiff a new trial. As a threshold issue, ESAB first argues that the trial court erred in receiving and considering Tuinstra's affidavit, which was offered in support of plaintiff's motion. We disagree. ESAB correctly observes that as a general rule, "jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997).[3]

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[1] The court rule reads in pertinent part:

> If the court finds that the only error in the trial is the inadequacy . . . of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest . . . amount the evidence will support.

[2] The Court reasoned, in part, that "in view of the vast difference in the damage awards between the first and second trials, it appears that the issue of comparative negligence significantly influenced the determination of plaintiff's damages." *Bynum I, supra* at 3.

[3] The purpose of this nonimpeachment rule is to insulate the deliberative process of the jury. See *Budzyn, supra* at 91; *People v Pizzino*, 313 Mich 97, 108; 20 NW2d 824 (1945). In so doing, the rule promotes the integrity of judicial system by supporting the finality of jury verdicts, encouraging open discussion in the deliberative process, and impeding the post-trial harassment of jurors by the parties. *Hoffman v Monroe Public Schools*, 96 Mich App 256, 258; 292 NW2d 542 (1980); *United States v Dioguardi*, 492 F2d 70, 79-80 (CA 2, 1974). However, the nonimpeachment rule is not absolute and should not be dogmatically applied, especially when it conflicts with other important policy considerations. *Hoffman, supra* at 258. First and foremost among these is "the guarantee that every litigant receive a fair trial." *Tobias v Smith*, 468 F Supp

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However, it is clear from the trial court's written opinion that it did not consider the affidavit and subsequent testimony pursuant to an attempt to impeach the verdict. Rather, the court approached the admissibility of the evidence in terms of an allegation of jury misconduct during voir dire:

> "There is no question that a litigant is entitled to a truthful answer from a prospective juror during his [or her] *voir dire* examination," . . . and that a new trial is in order when a juror conceals information during voir dire which would lead a party to challenge the juror, provided the evidence of misconduct is not proffered for the purpose of impeaching the verdict. Litigants have an "absolute right to a fair and impartial jury," and voir dire, which means to "speak the truth," is the only safeguard a litigant has for protecting that right. Therefore, a lack of candor is an inherently prejudicial lapse which must be corrected.
>
> Juror Tuinstra's testimony convinces this Court that other jurors had both a closed mind toward plaintiff's case and a lack of respect for her lawyer solely because she and he are African-Americans. The contrary testimony was not persuasive. . . .
>
> In its introductory comments, this Court unequivocally told the entire jury panel that it needed to know, so that it could determine whether they might get in the way, of any biases and prejudices, and that it expected them to reveal any such attitudes. Nothing of that sort was disclosed by anyone, although we now know that some harbored racial prejudices. Thereafter, plaintiff's counsel twice discussed "biases" in general with the prospective jurors. . . . No one said anything in response. Then, near the end of his voir dire, plaintiff's counsel discussed specifically with the jurors the fact that he and his client were African-Americans. Again nothing was disclosed by anyone. . . . Had [racial bias] been disclosed by those who harbored it, that bias would have prompted their dismissal from the jury.
>
> Finally, contrary to defendant's contention, plaintiff is not attempting to impeach the verdict. . . . Ms. Tuinstra's testimony establishes that a matter of considerable significance, a matter which would have led to dismissal from the jury, was concealed on voir dire. That is evidence of misconduct which warrants

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1287, 1289 (WD NY, 1979). See also *Mattox v United States*, 146 US 140, 148; 13 S Ct 50; 36 L Ed 917 (1892)(recognizing that cases can arise where it would be impossible to refuse to receive such juror affidavits "without violating the plainest principles of justice"). We find persuasive those cases that have determined that to ignore evidence of racial bias in the jury room would effectively undermine the very notion of fundamental fairness. See, e.g., *Tobias, supra* at 1291; *Smith v Brewer*, 444 F Supp 482, 490 (SD Iowa, 1978). While the unexpressed personal biases of each juror cannot be explored, given that such innermost thoughts truly do inhere in the verdict rendered, once those biases are expressed, they become an overt act that can be examined, albeit without attempting to explore the thought processes employed by the jurors when reaching a verdict. Such behavior is an improper extraneous prejudicial influence. *Tobias, supra* at 1291.

> a new trial, not the impeachment of a verdict . . . . [Citations and footnotes omitted.]

In this context, Tuinstra's affidavit and subsequent testimony are not encumbered by the nonimpeachment rule. *United States v Henley*, ___ F3d ___ (CA 9, 2001).

We also reject ESAB's contention that the trial court erred in ordering a new trial. "A trial court's decision regarding a motion for new trial is reviewed for an abuse of discretion." *Meyer v City of Center Line*, 242 Mich App 560, 564; 619 NW2d 182 (2000).

> The rule in this State is that the judge has a wide discretion in either granting or refusing a new trial . . . .
>
> > "Even greater latitude is allowed the trial court in granting than in refusing new trials, and the appellate court will interfere more reluctantly where the new trial is granted than where it is denied." [*Hoskin-Morainville Paper Co v Bates Valve Bag Corp*, 268 Mich 443, 449-450; 256 NW 477 (1934).]

The trial court obviously considered Tuinstra's testimony that racial bias existed to be highly credible. It also found contrary testimony offered by three other jurors to be unpersuasive. Recognizing the trial court's unique opportunity to observe the witnesses and to assess their credibility, see *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996), we find nothing in the record that persuades us that the trial court's crediting of Tuinstra's testimony was erroneous. Therefore, accepting the court's conclusion on the existence and demonstration of racial prejudice by some jurors, we agree with the court's judgment that had the jurors revealed their bias, the court would have been justified in dismissing them from the jury. See *McDonough Power Equipment, Inc v Greenwood*, 464 US 548, 556; 104 S Ct 845; 78 L Ed 2d 663 (1984)(observing that to obtain a new trial, " a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have to provide a valid basis for cause"); *People v Clear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). We do not believe that the record supports a conclusion that the trial court abused its broad discretion in this matter.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski